

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES

v.

MANNING, Bradley E., PFC

U.S. Army, (b) (6)

Headquarters and Headquarters Company, U.S.

Army Garrison, Joint Base Myer-Henderson Hall,

Fort Myer, VA 22211

**DEFENSE SUPPLEMENT TO
ARTICLE 13 MOTION**

DATED: 24 August 2012

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, pursuant to applicable case law and Rule for Courts Martial (R.C.M.) 907(a) requests this Court to dismiss all charges with prejudice owing to the illegal pretrial punishment PFC Manning was subjected to in violation of Article 13, UCMJ and the Fifth and Eighth Amendments to the United States Constitution. Alternatively, the Defense requests that this Court grant meaningful relief to include at least 10-for-1 sentencing credit.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. The Defense, as the moving party, bears the burden to present evidence to support PFC Manning's claim of illegal pretrial punishment. This involves a "relatively low burden of proof." *United States v. Scalarone*, 52 M.J. 539, 544 (N-M. Ct. Crim. App. 1999). Once the Defense does this, the burden then shifts to the Government to present evidence to rebut the allegation beyond the point of inconclusiveness. *See United States v. Cordova*, 42 C.M.R. 466, 1970 WL 7132 (A.C.M.R. 1970); *United States v. Scalarone*, 52 M.J. 539, 543-4 (N-M. Ct. Crim. App. 1999).

WITNESSES/EVIDENCE

3. The Defense requests the following additional witnesses to its original witness request be produced for this motion:

- a) LtGen. George J. Flynn;
- b) Col. Christopher Miner;
- c) Col. (R) Daniel Choike;
- d) CDR Han Bui;
- e) Capt. Mary Neill;
- f) LtCol. Christopher Greer;
- g) CPT John Haberland;

- h) COL Carl Coffman;
- i) CWO5 Abel Galaviz;
- j) CWO4 James Averhart;
- k) CWO2 Denise Barnes;
- l) MSgt Craig Blenis;
- m) MSgt Brian Papakie; and
- n) GySgt William Fuller.

4. The Defense also requests the Court to consider, in advance of the motions hearing, the 1,290 emails that the Government received from Marine Corps Base Quantico. These emails were in response to the Government's 28 April 2011 Request for Prudential Search and Preservation of Information. *See* Attachment A to Defense Motion to Compel Discovery #3.

ATTACHMENTS

5. The Defense respectfully requests that this Court consider the following Attachments:

- a) Attachment A, 84 emails provided by the Government on 26 July 2012; and
- b) Attachment B, email from Government to Defense dated 20 January 2011.

FACTS

6. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of conduct prejudicial to good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting government property, and two specifications of knowingly exceeding authorized access to a government computer, in violation of Articles 92, 104, and 134, Uniform Code of Military Justice (UCMJ) 10 U.S.C. §§ 892, 904, 934 (2010). PFC Manning has been held in pretrial confinement since 29 May 2010, a total of 819 days. For 265 of these days, PFC Manning was held in conditions tantamount to solitary confinement at the Quantico Brig.

7. On 28 April 2011, the Government submitted a "request for prudential search and preservation of information" to Col. Daniel Choike, the Commander of Quantico. *See* Attachment A to Defense Motion to Compel Discovery #3. The document submitted by MAJ Fein requested Col. Choike to "take any and all reasonable and necessary steps to preserve any information held by your command which concerns or references PFC Manning" and secondly "that your command conduct a thorough and comprehensive search of its records for information which relates to PFC Manning's confinement at the Quantico Brig." *Id.* In August of 2011, the Government began receiving documentation responsive to its preservation request. *See* Attachment C to Defense Motion to Compel Discovery #3.

8. On 20 December 2011, LtCol. Christopher M. Greer, the Staff Judge Advocate for Col. Oltman, confirmed that "all relevant electronic correspondence, electronic files and hard copy

documentary evidence regarding the confinement of PFC Manning in the possession of Marine Corp [B]ase Quantico official[s] have been provided. Trial counsel were permitted to view and copy all relevant files maintained by the Quantico Pretrial Confinement Facility.” *See* Attachment B to Defense Motion to Compel Discovery #3.

9. The Government began providing documentation related to PFC Manning’s confinement at Quantico in October of 2011. Based upon the volume of the information provided, the Defense believed that this was the full extent of the information the Government had from Quantico.

10. On 25 July 2012, almost a year after the Government first began receiving documentation from Quantico, and almost seven months after receiving the last of the Quantico documentation, the Government started reviewing the emails that it had received from Quantico. *See* Attachment C to Defense Motion to Compel Discovery #3. According to the Government, it started reviewing these emails “in preparation for the defense Article 13 motion.” *Id.* The Article 13 motion, however, had been on the case calendar since this case was referred. The established deadline for the Defense to file the Article 13 motion was 27 July 2012.

11. Once the Government elected to review the Quantico documentation, it reviewed a total of 1,374 emails on 25 and 26 July 2012. *Id.*, *see also* Attachment F to Defense Motion to Compel Discovery #3. On 26 July 2012, the Government selected 84 emails that it believed were “obviously material to the preparation of the defense” and produced them to the Defense. *See* Attachment D to Defense Motion to Compel Discovery #3.

12. On 27 July 2012, the Defense notified the Court that MAJ Fein had sent, at 2115 on 26 July 2012, 84 separate emails which depicted high level discussions at Quantico concerning PFC Manning’s custody status. *See* Attachment A. On 17 August 2012, the Defense submitted a motion to compel production of the remaining 1,290 emails.

ARGUMENT

13. The Defense, in its original Article 13 motion filed on 27 July 2012, asserted that an order had been given by Col. Robert G. Oltman to retain PFC Manning indefinitely in Maximum Custody (MAX) and on Prevention of Injury (POI) status. Col. Oltman was the Security Battalion Commander and the senior rater of the Brig Commander. His order to keep PFC Manning in MAX and POI was given during a meeting attended by the Brig leadership, the Brig psychiatrists, and the Quantico Base SJA, LtCol. Christopher Greer.

14. The order by Col. Oltman to the Brig personnel explains why PFC Manning was maintained in MAX and POI in spite of his compliant behavior and the repeated recommendations of Brig psychiatrists to remove him from POI status. The order also clearly demonstrates that PFC Manning was denied his required procedural due process. The Classification and Assignment (C&A) Board “reviews” conducted during PFC Manning’s time at the Quantico Brig were simply for show, since the result had already been predetermined.

15. At the time Col. Oltman gave his order, Capt. Hocter believed that Col. Oltman was simply relying on an order from someone above him in the chain of command. Although Col. Oltman did not name this individual, Capt. Hocter believed that Col. Oltman was not acting on his own in ordering the Brig to retain PFC Manning in MAX and POI.

16. The 84 emails provided by the Government on (literally) the eve of the Defense's filing reveal that Capt. Hocter's suspicions were correct. These emails expose that everybody at Quantico, from a three-star-general to lower enlisted marines at the brig, was complicit in the unlawful pretrial punishment of PFC Manning.

17. At the top of the food chain was LtGen. George J. Flynn, the Commanding General of Marine Corps Combat Development Command at Quantico. His orders and directives regarding PFC Manning resulted in a culture of indifference for how the confinement conditions were impacting PFC Manning.

18. Instead of following the recommendations of their mental health professionals, Quantico officials chose to discount the wisdom of their advice and concentrate more upon any potential negative publicity. Even the judge advocates at Quantico abdicated their moral responsibility to speak up when the chain of command was going awry.

19. Ultimately, those who should have done something to address PFC Manning's confinement conditions did nothing. As a result, the status quo of MAX and POI persisted month after month for 265 days. The 84 emails demonstrate that the culture of indifference was not broken until PFC Manning was moved to the Joint Regional Correctional Facility at Fort Leavenworth and a place that was not under the influence of LtGen. Flynn.

A. PFC Manning's Custody Status was Ultimately Controlled by LtGen. Flynn

20. Shortly after PFC Manning arrived at the Quantico Brig, on 9 August 2010, LtGen. Flynn contacted Col. Oltman and Col. Choike. LtGen. Flynn forwarded a newspaper story from the New York Times concerning PFC Manning's background, and stated the following:

Bob and Dan,

We have had one suicide of a high risk prisoner in the brig. We need to make sure that we have covered down on what we learned from that case. Based on the below [the New York Times story], this young man has a great deal on his plate and it would be good if you impressed upon all who come in contact with Pvt. Manning the absolute necessity of keeping a close watch on him. This includes Brig, medical, Chaplain and transport personnel. His life has completely fallen apart which makes him a strong candidate (from my perspective) to take his life.

S/F
GJF

See Attachment A, Bates Number 00449895. The email from LtGen. Flynn clearly indicated to Col. Choike that LtGen. Flynn (Col. Choike's Commanding General) had PFC Manning on his radar and that PFC Manning's custody status and the precautions taken by the Brig to ensure that PFC Manning would not commit suicide were very important to him. In response, Col. Choike stated that he "directed the CO of the Naval Health Clinic and [Col. Oltman] that they provide [] weekly updates on Manning, by providing general info on his attitude and mental health." See Attachment A, Bates Number 00449894. Col. Choike indicated that he would "forward a copy of the weekly reports" to LtGen. Flynn "personally" and that this would be "separate from the weekly Base updates." *Id.* Col. Choike impressed upon LtGen. Flynn that "we all understand the importance of maintaining a close watch." *Id.*

21. In order to meet the information requirements of his Commanding General, Col. Choike sent weekly updates to LtGen. Flynn on the confinement status of PFC Manning. In addition to LtGen. Flynn, Col. Choike copied several other high-ranking Quantico officials on the emails that he sent in order to ensure everyone was informed of what was happening with PFC Manning.

22. The number of emails generated in relation to PFC Manning and his confinement status – at least 1,374 – make it clear how important this issue was to LtGen. Flynn and to Quantico. Additionally, Col. Choike, in an email to Col. Oltman, states in no uncertain terms that LtGen. Flynn wanted to be able to determine "the political impact, media interest, legal ramifications, and senior leadership reactions" to any significant issue dealing with PFC Manning. See Attachment A, Bates Number 00449914. Based upon LtGen. Flynn's directive, the chain of command kept him informed on all issues regarding PFC Manning.

23. The fact that LtGen. Flynn was the one "calling the shots" with respect to PFC Manning's custody determinations is clear based upon an email exchange between Col. Choike and Col. Oltman on 10 March 2011. The timing of this email exchange is significant because it comes a few days after CWO2 Barnes' decision to strip PFC Manning of all of his clothing and the public outcry due to PFC Manning's forced nakedness. The public perception of PFC Manning's treatment undoubtedly sparked the interest of LtGen. Flynn due to his concern over the "political impact, media interest, legal ramifications, and senior leadership reactions" to any issue dealing with PFC Manning.

24. On 10 March 2011, Col. Oltman sent the following email to Col. Choike:

Gents

Just got off phone with XO. She has informed me that any changes in Manning Status must be approved by Base CO [Col. Choike]. I think there is an assumption being made that CW02 Barnes is acting alone and unafraid in her decision process with regard to status and or handling instruction changes with regard to Manning. That is not the case. She and I discuss, same as I did with Averhart, every decision and every change and to date I have concurred with all. Also every change has been discussed with the Boss [LtGen. Flynn]. Not sure how much more involved we can be. Understand where guidance is coming from

and we will do as directed. However I respectfully make the following requests
1) We adhere to the chain of command. Barnes will conact [sic] me and I will contact Base CO. 2) Based on conditions etc we, Sec BN will make a recommendation/request to implement the change. Should there be non concurrence and different guidance given we would like to have it in writing in order to annotate in the file. We can set up whatever paperwork is required. We are on board just want to ensure the files are properly documented.

R/rgo

25. In addition to Col. Choike, Col. Oltman copied the Chief of Staff for the Marine Corps Base Quantico, Col. Mark M. Kauzlarich, and his Battalion Executive Officer, Maj. Amy R. Ebitz. Col. Oltman was clearly troubled by the perception that CWO2 Denise Barnes was making decisions regarding PFC Manning's custody status on her own. He was troubled by this perception because he knew that this was not the case. The decisions being made by CWO2 Barnes and her predecessor CWO4 Averhart were being made with his input and guidance. Col. Oltman reviewed "every decision and every change" regarding PFC Manning. Based upon his level of involvement, Col. Oltman accurately stated to Col. Choike "not sure how much more involved we can be." See Attachment A, Bates Number 00449915.

26. After voicing his frustration with the appearance that CWO2 Barnes was "acting alone and unafraid" in her decisions, Col. Oltman stated that he understood "where guidance is coming from and will do as directed." *Id.* Col. Oltman's resignation to follow the directives of those above him is not surprising. The adherence to the chain of command is something stressed into a soldier from day one. Despite his adherence to the chain of command, Col. Oltman requested written documentation of any non-concurrence or different guidance from LtGen. Flynn. Col. Oltman clearly wanted to have some documentation for his files in the event that questions were ever raised regarding how PFC Manning was being held at the Brig.

27. In response to Col. Oltman's email, Col Choike stated the following:

Bob,

What you have listed below is on target. The instructions given to me were best passed on personally to CW02 Barnes, based upon the last two lengthy meetings with the CG. I don't prefer this approach and would rather go through you, but your TAD trip and absence creates this situation. Much is lost in email missives.

I just got off the phone with CW02 Barnes and let her know about your email and the CG's intent. I know how things go and what you have done in the past in terms of notifying me, I only ask/reconfirm that any decisions to change handling instructions or assignment status is briefed first, before executed. Actions required to save life and/or protect from injury are not included in this for obvious reasons.

You and I supporting/concurring with the Brig OIC's decisions that change handling instructions or assignment status, without passing that info to CG MCCDC for consideration, is no longer acceptable. We/you are not going to get anything in writing from CG MCCDC if he rejects/modifies a recommendation. Memo's for the record can be discussed more between you and I, in an effort to address your concerns about proper documentation/file keeping.

Summary - #1 - yes adhere to the chain of command, and hopefully you understand why that didn't happen right now. #2 Yes - recommendations forwarded to me for discussion and concurrence and then recommendation forwarded to CG, MCCDC before implementation. I will not blindly forward a recommendation to the CG, instead I'll discuss it with you so you will know exactly what I forward. #3 Non-concurrence in writing - we need to discuss and determine the best way to document decision/final actions for the record. CG wants to be able to determine political impact, media interest, legal ramifications, and senior leadership reactions, and can't do so without him being in the loop upfront.

SF, Dan

PS- When do you get back?

See Attachment A, Bates Number 00449914 through 00449915.

28. Col. Choike's response to Col. Oltman reveals who the true puppet-master was in PFC Manning's custody status. He informs Col. Oltman that he had two lengthy meetings with LtGen. Flynn about PFC Manning. Based upon those meetings, he received direction as to how things would be handled with any custody change involving PFC Manning. Col. Choike then passed LtGen. Flynn's instructions personally on to CWO2 Barnes.

29. The instructions relayed by Col. Choike were simple: the days of making decisions without LtGen. Flynn's concurrence were over. Instead, the decision of CWO2 Barnes and Col. Oltman needed to be forwarded to Col. Choike for review. After discussing the decision and deciding on the best course of action, the proposal would be forwarded to LtGen. Flynn for his final decision. Assuming LtGen. Flynn concurred with the decision, then the proposed action could proceed. If LtGen. Flynn did not concur with the decision, then the proposed action needed to change.

30. The "new" guidance from LtGen. Flynn was not really all that new. Instead, it simply reinforced the 9 August 2010 guidance given by LtGen. Flynn to Col. Choike. On 9 August 2010, LtGen. Flynn directed Col. Choike to ensure that it was "impressed upon all who come in contact with Pvt. Manning the absolute necessity of keeping a close watch on him." *See Attachment A, Bates Number 00449895.* Based upon this guidance, everyone in the chain of command understood that LtGen. Flynn believed PFC Manning was a suicide risk and acted accordingly by keeping him in MAX and POI.

31. CWO4 Averhart, and later CWO2 Barnes, obviously followed the guidance given to them by LtGen. Flynn. Their decision to blindly adopt what was expected of them ensured they would not be blamed for anything that happened to PFC Manning. Due to LtGen. Flynn's improper involvement, the entire process quickly broke down. Instead of basing PFC Manning's confinement status upon the recommendations of mental health professionals and the daily reports of Brig officials, the C&A Board and the Brig Commander chose to select the path of least resistance. Their independent decision process was supplanted by a twisted game of musical chairs played by Col. Choike, Col. Oltman, CW04 Averhart, CW02 Barnes, MSgt Blenis, MSgt Papakie, and GySgt Fuller. Everyone associated with the PFC Manning issue wanted to ensure that if the music stopped (PFC Manning harmed himself), that they would have a chair to sit down in.¹

32. It is axiomatic that when an O6 relays a directive from an O9 to a warrant officer, that warrant officer is going to follow the directive. In this instance, the directive not only affected the entire process, it provided top cover to the so-called "decisions" of CWO4 Averhart and CWO2 Barnes to keep PFC Manning in MAX and POI status. Col. Oltman reviewed every decision and every change to PFC Manning's custody status with CWO4 Averhart and CWO2 Barnes. He then discussed these decisions with Col. Choike who subsequently briefed them to LtGen. Flynn. As Col. Oltman put it, "Not sure how much more involved we can be." See Attachment A, Bates Number 00449915.

33. The chain of command's involvement, and LtGen. Flynn's opinion that PFC Manning was a suicide risk, tainted the entire process. The improper influence of LtGen. Flynn, Col. Choike and Col. Oltman, had the practical effect of ensuring that nothing would change with PFC Manning's custody status. Undoubtedly, CWO4 Averhart, CWO2 Barnes, and the Brig enlisted staff understood what they needed to do. They needed to toe the line. These individuals toed the line when they made their recommendations to keep PFC Manning in MAX and POI in spite of the recommendations of mental health professionals and the documented daily good behavior of PFC Manning.

34. Even if someone at the Brig did not like the process or how PFC Manning was being held in MAX and POI, what hope could such an individual have of changing anything if they placed themselves in contradiction to the directives being given by LtGen. Flynn? Even Col. Oltman, who clearly did not like the process, succumbed to the improper influence of LtGen. Flynn.

35. The fact that LtGen. Flynn's conduct was improper is evidenced by his apparent refusal to put anything in writing in the event that he did not concur with a custody status action intended by the Brig. As stated by Col. Choike we "are not going to get anything in writing from CG MCCDC [LtGen. Flynn] if he rejects/modifies a recommendation." See Attachment A, Bates

¹ Musical chairs is a game played by a group of people (usually children), often in an informal setting purely for entertainment such as a birthday party. The game starts with any number of players and a number of chairs one fewer than the number of players; the chairs are arranged in a circle facing outward, with the people standing in a circle just outside of that. A non-playing individual plays recorded music. While the music is playing, the players in the circle walk in unison around the chairs. When the music player suddenly stops the music, everyone must race to sit down in one of the chairs. The player who is left without a chair is eliminated from the game, and one chair is also removed to ensure that there will always be one fewer chair than there are players. See Wikipedia available at http://en.wikipedia.org/wiki/Musical_chairs, last visited on 23 August 2012.

Number 00449914. In the end, LtGen. Flynn never had to put anything in writing. PFC Manning remained in MAX and POI so there was never a need to non-concur. This was not because PFC Manning needed to be in MAX and POI, but because that is what the chain of command wanted to happen. As a result, PFC Manning's custody status remained the same.

36. When complaints about PFC Manning's confinements surfaced in early 2011, Pentagon officials went to great pains to state that PFC Manning was being treated like every other detainee. President Barack Obama even stated that he was assured the PFC Manning's confinement status was in compliance with all applicable rules and regulations. In view of the evidence that has come to light since that time, the contention by the Pentagon and the President is laughable. Senior ranking officials (to include LtGen. Flynn, Col. Choike, Col. Oltman, Col. Miner, LtCol. Greer and others) were involved in the day-to-day minutia of issues involving PFC Manning. The Defense would hazard to guess that a three star general was not briefed virtually any time another detainee at the Quantico Brig went to the bathroom.

37. For example, on 30 November, GySgt Blenis sent an email to CWO4 Averhart recounting a conversation with defense counsel about PFC Manning sleepwalking. GySgt Blenis stated:

I'm bringing this to your attention because the specifics of [the sleepwalking incident] was in the weekly report. The chain of this information went from guard to me, and from me to MSgt Papakie and yourself via the weekly report. To my understanding this report goes from yourself to our Commanding Officer, then to Col Choike who I assume briefs LtGen Flynn, for the reason of them being "in the know" for anything concerning Manning's confinement. It appears that information from this report is going in other directions, and I'm just not sure if that is planned or appropriate, and if it is not, who needs to know. This may all be by design above our heads, but I'm not comfortable sitting on this information and potentially leaving you or MSgt Papakie open to being blindsided. *See* Attachment A, Bates Number 00449942.

What is clear from this email is that every high ranking official at Quantico, to include LtGen. Flynn, needed to know everything about everything.

38. Other instances of high-ranking officials getting overly involved in the minutia of PFC Manning's day-to-day confinement include the following:

- On 14 December 2010, Col. Choike asked Capt. Neill the following, "Family came to visit this weekend also, was there any noted change [to PFC Manning's spirits] after their visit?" *See* Attachment A, Bates Number 00449908.
- On 21 January 2011, high-level Brig officers coordinated the Brig's response to an upcoming visit of two weekend visitors. This included a specially-drafted script that would be required to be read to the visitors upon their arrival. *Id.* at 00449878.
- On a Sunday afternoon (23 January 2011), LtGen. Flynn was notified that "Coombs (Manning's lawyer) had called the Brig directly, in order to inform Manning of issues ... at the gate. That is an unauthorized communication ..." *Id.* at 00449933.

- That same Sunday afternoon, LtGen. Flynn was involved in email dialogue with Col. Olman and Col. Choike, among others, about the denial of PFC Manning's visitors. LtGen. Flynn asked "Did we offer to call them a cab?" when told that the visitor's car had been towed. *Id.* Also copied on this series of emails was MajGen. Vaughn A. Ary² (along with at six other high-ranking officers).
- On 16 March 2011, CWO2 Barnes informed Col. Oltman that PFC Manning had removed two visitors from his list. *Id.* at 00449857.
- On 23 March 2011, Col. Oltman informed Col. Choike and seven other high ranking officers that "Manning talks as to why he made changes to his visitation list. Most removals were due to those individuals not visiting. He further states that some were removed due to the relationship deteriorating (my words)." *Id.* at 00449874.
- On 1 April 2011, Col. Oltman forwarded a message from CWO2 Barnes explaining that week's decision to retain PFC Manning in MAX and POI to Col. Choike and Col. Kauzlarich. *Id.* at 00449885.

39. In addition to LtGen. Flynn being briefed regularly about PFC Manning's confinement status, Col. Choike and Col. Oltman were briefed weekly. These briefings also included minutia of PFC Manning's confinement that would not ordinarily see the eyes of senior commanding officers. For instance, Capt. Neill notes in one of her reports that "CAPT Hocter is securing book for detainee to read (interested in science fiction)." *See* Attachment A, Bates Number 00449846. This is like the President of the United States being briefed on what color an intern's shoes are on a particular day. Clearly, this is not normal detainee reporting.

40. The Brig enlisted marines who sat on PFC Manning's C&A Board week-after-week, month-after-month, were all aware of LtGen. Flynn's involvement in the case. As indicated above, MSgt Blenis (who repeatedly sat on PFC Manning's Board) stated:

To my understanding this report goes from yourself [CWO4 Averhart] to our Commanding Officer, then to Col Choike who I assume briefs LtGen Flynn, for the reason of them being "in the know" for anything concerning Manning's confinement. *See* Attachment A, Bates Number 00449942.

Given that all three enlisted who sat on PFC Manning's Board knew that LtGen. Flynn was watching the case closely, there was no incentive to ever recommend anything other than the *status quo* (MAX and POI) – which all the enlisted knew was acceptable to LtGen. Flynn. Any other recommendation might put their career in danger.

41. Col. Oltman will testify that he specifically spoke to the enlisted who sat on PFC Manning's C&A Board and advised them that they should not feel pressure to vote a certain way because of LtGen. Flynn. This is a damning admission. Why is there the need to consult with enlisted marines sitting on PFC Manning's C&A Board unless such individuals were actually being influenced in their determinations by LtGen. Flynn's (implicit or explicit) directive? Even after Col. Oltman apparently spoke with them, these enlisted marines unanimously and consistently recommended that PFC Manning would remain in MAX and POI.

² Major General Vaughn A. Ary is the Staff Judge Advocate to the Commandant of the Marine Corps. He is the Marine Corps equivalent of the Army's Judge Advocate General, Lieutenant General Dana K. Chipman.

42. The message from above to those who sat on PFC Manning's C&A Board was clear – you will be safe so long as you continue to recommend that PFC Manning be retained in MAX and POI. Knowing that this was the acceptable classification status for both their immediate supervisors as well as LtGen. Flynn meant that those who sat on the C&A Board could not go wrong in continuing to recommend MAX and POI.

43. Not only did the enlisted who sat on the C&A Board know about LtGen. Flynn's "preferences" with respect to the classification status, they also knew that their superiors had disdain for the doctors at the Brig (discussed in detail below). For instance, GySgt Blenis is copied on an email from CWO4 Averhart where CWO4 Averhart states that he has "concern with the mental evaluation Det. Manning is currently receiving." *See* Attachment A, Bates Number 00449812. Again, the message could not be more clear. When your boss telegraphs to you that he does not have confidence in a medical opinion, it only makes sense that you too discount that medical opinion.

44. Given the guidance and directives by LtGen. Flynn, it is not surprising that everyone involved in the process would adopt his view. It was clear to anyone that the benefit of doing the right thing and recommending removing PFC Manning from MAX and POI was far outweighed by the amount of scrutiny they would receive from LtGen. Flynn. Additionally, no one in the process was willing to risk their careers if it turned out that the mental health professionals were wrong about removing PFC Manning from POI.

45. In January of 2011, LtCol. Troy Wright suggested that if Quantico had nothing to hide, it shouldn't have a problem with an independent investigation into the conditions of PFC Manning's confinement:

One of the complaints in the press that's getting a lot of play is PFC Manning's MAX custody status. I thought that just like a competent doctor who has confidence in his own work would recommend that a patient get a second opinion before a major surgery/treatment that having Army Corrections take a second look at the custody classification of Manning would verify that Quantico brig got it right.

See Attachment A, Bates Number 00449937. Not surprisingly, Col. Oltman did not agree. He stated that because the "USA IG and the USMC IC are satisfied with the package they have been provided, with regard to Manning, we longer feel that a visit/independent assessment from Mr. Stroebel will provide any value." *See* Attachment A, Bates Number 00449937. Accordingly, "we request that the visit be cancelled." *See* Attachment A, Bates Number 00449937. If Quantico officials truly had nothing to hide, there should not have been a problem with an objective and independent investigation.³

³ Note that the investigation appointed by Col. Choike in response to PFC Manning's Article 138 Complaint was far from independent. First, Col. Choike was complicit in the conduct that resulted in PFC Manning being retained in MAX and POI and second, the individual that Col. Choike appointed, CWO5 Abel Galaviz, was frequently included on the email exchanges by the chain of command concerning PFC Manning. As such, he was also clearly influenced by LtGen. Flynn, Col. Choike, Col. Oltman and others.

B. Quantico Officials Were Simply Worried About Bad Publicity

46. It is clear that the Brig was risk averse to the point of absurdity. If they could have put PFC Manning in a straight-jacket for nine months without calling undue attention to themselves, they would have. The reason for this was not to protect PFC Manning from harming himself, but to avoid any bad publicity that might arise from another suicide at the Brig. Protecting one's institution from embarrassment is not a legitimate non-punitive objective that can justify the imposition of unduly onerous confinement conditions.

47. LtGen. Flynn indicated from the outset that he wanted PFC Manning to be monitored very closely. *See* Attachment A, Bates Number 00449895. Based upon what he had read in the New York Times, LtGen. Flynn was worried that PFC Manning may take his own life. *Id.* LtGen. Flynn directed Col. Choike to ensure that he "impressed upon all who come in contact with Pvt. Manning the absolute necessity of keeping a close watch on him." *Id.*

48. LtGen. Flynn's directive to "keep a close watch" on PFC Manning resulted in everyone involved in the process to scrutinize and overreact to even the most benign behavior by PFC Manning. At first blush, LtGen. Flynn's directive could be mistaken as altruistic. It is only when one considers the main factors that LtGen. Flynn was concerned about ("the political impact, media interest, legal ramifications, and senior leadership reactions") that it becomes clear the goal was not altruistic. *See* Attachment A, Bates Number 00449914.

49. Ultimately, LtGen. Flynn was less concerned about what might happen to PFC Manning than he was with how it would reflect on Quantico and his chain of command if PFC Manning committed suicide. His concern over embarrassment was adopted by the entire chain of command. There are numerous examples of Quantico being worried about the high-visibility of this case, and the potential for embarrassment:

- On 9 August 2010, Capt. Neill wrote to Col. Choike that "CAPT Hocter reports solid line of communication between medical and security staff, however has noted that the new CO (or OIC) of the Brig has displayed significant concern and is anxious about high level of visibility and risk." *See* Attachment A, Bates Number 00449876.
- On 14 January 2011, the Quantico Base Staff Judge Advocate, LtCol. Greer, expressed concern over embarrassment and blame should something happen to PFC Manning. LtCol. Greer emailed Col. Choike, Col. Oltman and Col. Kauzlarich to inform them of a conversation that he had with the "Manning SJA personnel" (this refers to the trial counsel in this case). LtCol. Greer stated: "I made it clear to them [Army Trial Counsel] again that we have the day to day responsibility for Manning and if they are unhappy with Manning current status, then someone in the Army needs to take custody of him or relive us of the responsibility of his welfare... I reiterated our concern that if something goes wrong, there is not a single Army person that would be held responsible or found

to be accountable as long as he stays with us.” *See* Attachment A, Bates Number 00449939-40.

- On 23 January 2011, Col. Oltman was apprised of a situation on a Sunday afternoon where PFC Manning’s visitors were denied entrance at the gates of Quantico. Col. Oltman wrote “Will take it [the situational report] as soon as you can send. Want to get to PAO and CO before House [PFC Manning’s visitor] has an opportunity to put a negative spin on it.” *See* Attachment A, Bates Number 00449936.
- On 16 March 2011, CWO2 Barnes sent the following email to Col. Oltman:

Good Afternoon Sir, Cpl Sanford just informed me that detainee Manning removed his father and David House from his list of authorized visitors. We are going to have him fill out a new visitation list and a DD from 510 requesting the action. We have to be ready for negative media coverage on this because if House does not know he is no longer on the list and he is turned away this weekend, it will be on the blogs very quickly. Our Duty Brig Supervisors fills out paperwork whenever someone is turned away to properly document what occurred. This weekend also coincides with the planned protest and it may be a setup because for all protests or other contingencies, the MP’s call back to the Brig to verify who is on the inmates’ visitation lists. Once he hears that he is not on it, I am sure it will be a dramatic event and will appear as though we have “stopped his visits for no good reason.”

See Attachment A, Bates Number 00449857.

- On 10 March 2010, a Judge Advocate reached out to the Quantico Brig on behalf of MajGen Ary and the Under Secretary of the Navy regarding how long PFC Manning was sleeping naked before he got his smock. *See* Attachment A, Bates Number 00449859.

50. What is truly ironic is that there would not need to be a concern for embarrassment and media attention if the Quantico Brig had simply treated PFC Manning properly in the first place. The proof of this fact is that no similar media or embarrassment concerns have been expressed by Joint Regional Correctional Facility (JRCF) at Fort Leavenworth after PFC Manning was placed in Medium Custody.

C. Quantico Officials Had Disdain for Brig Psychiatrists and Thought Fit Themselves to Play Doctor

51. In the Defense’s Article 13 motion, the Defense chronicled the repeated recommendations of Brig psychiatrists to remove PFC Manning from POI status – recommendations that were ignored for 9 months by Quantico officials. The Defense also detailed examples of Quantico officials “playing doctor” by making what were medical annotations on the C&A forms that were not supported by the *actual* medical evaluations. The Defense argued that the doctors’

weekly opinions on PFC Manning's POI status were a pretense. The C&A board was a façade used by the Quantico Brig to provide the appearance that PFC Manning was accorded due process in his classification reviews.

52. The Defense now has additional evidence to support its claim that PFC Manning's was not afforded due process in his classification reviews. The 84 emails received from the Government demonstrate that senior Quantico officials were operating under guidance from LtGen. Flynn. These same officials also had an extreme disdain for the doctors' opinions at the Quantico Brig and thought themselves better positioned to make clinical determinations than actual medical doctors. Right from the very beginning, Quantico officials chose to ignore medical determinations in an effort to avoid even the remotest possibility of being embarrassed. The concerns of the Quantico officials were not legitimate non-punitive bases in order to keep PFC Manning in MAX and POI.

53. On 9 August 2010, Capt. Mary Neill, the Commander of the Naval Health Clinic at Marine Corps Base Quantico, sent an email to Col. Choike briefing him on PFC Manning's visit from Behavioral Health. *See* Attachment A, Bates Number 00449848. She noted that the recommendation from Behavioral Health was to move from suicide prevention to prevention of injury as a prescribed posture for medical and security to follow. *Id.* Col. Choike responded that despite the recommendation of the medical health providers, "the OIC's preference is to hold off for a couple of days on making the change." *Id.* Col. Choike, in turn, forwarded the correspondence to LtGen. Flynn for his review. *See* Attachment A, Bates Number 00449918. LtGen. Flynn asked, "with the status being changed by the medical authority what is the logic for continuing other than the OIC preference?" Col. Choike replied in turn:

Final determination of the conditions mentioned above was made by the Brig OIC, he felt that it was necessary to continue the observation period under a suicide risk status for a couple more days, and the mental health physician agreed that Weds [Wednesday] was appropriate to change the status to Prevention of Injury, given all the circumstances surrounding Manning's transfer to our Brig. PFC Manning was a suicide risk when we received him and the Army's mental health physicians provided us sufficient medical documentation / recommendations that were sent ahead of Manning before his arrival. The Brig OIC has no documentation from Army Corrections/Confinement officials, we basically received Manning cold, thus the reason why CWO Averhart is taking a more cautious approach. He desires to have a little more time to observe Manning, and to build up some rapport with him. *Id.*

54. In reality, "the mental health physician" did *not* agree that Wednesday was appropriate to change the status to Prevention of Injury. Capt. Hocter wrote in an email to Capt. Neill that he was "not happy" about this decision:

Skipper-I just spoke to GySGT Blevins [sic] about the detainee. They have the necessary paperwork from me and the OIC received it yesterday. Per GySGT, the OIC elected to continue suicide precautions, not from a suicide risk standpoint, but for security reasons. I do wish they would at least let him have his clothes

back (I recommended no shoelaces or belts for example). I'm not real happy about this. However, my experience with the Brig has been that they stick to their guns. I'd appreciate your thoughts. *See* Attachment A, Bates Number 00449848.

55. Thus, it is clear that right from the beginning of PFC Manning's time at Quantico, CWO4 Averhart was going to do what he was going to do – despite any medical opinion to the contrary. In an email from CWO4 Averhart to Col. Oltman and Col. Choike, CWO4 Averhart stated that “although I understand Captain Hocter's recommendation to down grade detainee Manning [sic] status to Prevention of Injury (POI), it is my professional opinion that this would not be a good idea at this time.” *See* Attachment A, Bates Number 00449824. As discussed in the Article 13 motion, the Secretary of Navy Instruction (SECNAVINST) requires a medical health provider's concurrence in order to retain a detainee in suicide risk. Here, in retaining PFC Manning in Suicide Risk (SR) contrary to a doctor's determination, CWO4 Averhart acted contrary to Navy regulation.

56. CWO4 Averhart's disdain for Capt. Hocter and his medical opinions is readily apparent in a 23 November 2010 email to Maj. Ebitz (copying Col. Oltman, MSgt Papakie and GySgt Blenis):

Per my last email,

I request that we keep close hold until we can discuss in a meeting. I've had the opportunity to review all of Dr. Hocter's evaluations of Det. Manning since confinement. His evaluations are not consistent and appears to be on both sides of the water to cover his six in the case of ...

Attached are all of the SR/POI reviews written by Capt Hocter. They are in chronological order from oldest to newest. If you look at his comments and the boxes that are checked, they show great contradiction at times.

If you look at the boxes that are checked from week to week, they go back and forth randomly. These are serious trends that causes a Red Flag in my profession. I am unwilling to make any recommendation in reducing his custody or status.

At this time, SND will remain in his present status of Prevention of Injury.

I request a meeting to discuss recommendations and the way ahead with the Commanding Officer as I am now concern [sic] with the mental evaluation Det. Manning is currently receiving.

NOTE: Dr. Hocter will be deploying in approximately one month.

See Attachment A, Bates Number 00449812.

57. It is clear from this email that CWO4 Averhart believed, for whatever reason, that Capt. Hocter was not competent to be making medical determinations in this case. He believed that

Capt. Hocter was simply trying to “cover his six”⁴ in making these determinations. It is unclear where this belief came from – nothing about the medical evaluations was inconsistent or evidenced Capt. Hocter “cover[ing] his six” in respect of PFC Manning. If anything, it was the Brig that was “covering its six” in making unreasonable and unsupportable custody classifications in this case.

58. Moreover, CWO4 Averhart’s disdain for Capt. Hocter meant that PFC Manning was never given a fair opportunity to actually be removed from POI.⁵ The Brig assigned a doctor that it had no confidence in to evaluate PFC Manning, and then discounted that opinion because it had no confidence in it. When CWO4 Averhart repeatedly stated in his rebuttal to the Article 138 complaint that he considered all relevant factors, this was not true. One of those relevant factors – the medical recommendations – was discounted because CWO4 Averhart did not trust Capt. Hocter. The appropriate course of action in such a scenario is to replace Capt. Hocter. The Quantico Brig should not have allowed Capt. Hocter to be the treating physician for PFC Manning, and then simply ignore his medical recommendations. As the Defense will demonstrate, below, however, no opinion of any medical provider – to include Capt. Hocter’s successor – would ever be sufficient for Quantico officials who had already made up their minds on PFC Manning’s custody status.

59. Not only did Brig officials ignore actual medical recommendations, they themselves often decided to “play doctor.” For example, on 23 February 2011, CWO2 Barnes disagreed with COL Malone’s determination that PFC Manning should be removed from his medications.

Sir, after doing some more legwork I realized that Manning did not refuse his meds. When Doc Malone saw him Friday, they both agreed that he should be off Colonapin (spelling) one of his anti-depressants, so that’s why he said he did not want the meds. As per Col. Malone, both HM3 Dodson and HM3 Burr were told about the change and somehow it wasn’t adjusted on his chart. Additionally, Col. Malone is in the process of weaning him off the other antidepressant, Zoloft which I have a concern with. I spoke to Col Malone today to find out the reason because if the limitations of confinement and the uncertainty of his future are additional stressors I did not see why he would take him off the meds. His response to me was that since he has the extra supervision, he feels comfortable taking him off the meds. See Attachment A, Bates Number 00449867.

60. Col. Oltman responded asking, “So he is saying that since he is on POI we can reduce his meds? Let’s just make sure we are clear on what he is saying.” *Id.* CWO2 Barnes clarified that “no, [the doctor] is not saying that now because he is on POI and not SR, he is taking him off meds or reducing them. They just both decided in general that he does not need it.” *Id.* CWO2 Barnes, however, was not satisfied with COL Malone’s medical determination that PFC Manning no longer needed to be on a certain medication. She wrote to Col. Oltman:

⁴ This phrase, “cover his six” is a colloquial phrase which means to protect oneself or to look after your own self-interest in any given situation.

⁵ Col. Oltman will also testify that he did not have confidence in Dr. Hocter’s medical determinations.

I am looking at someone who is not an out-patient who is in the friggin Brig, so that alone will add to his stress/depression especially once the pace of the legal proceedings pick up. It will only get worse once the true weight of his legal situation/future hits him. *Id.*

61. Like CWO4 Averhart, CWO2 Barnes thought herself better positioned to make medical determinations for PFC Manning than the Brig doctor. Her “medical opinion” was that because PFC Manning was in a “friggin Brig” and faced serious charges, he should continue to be fed a daily regimen of antidepressants.

62. This was not the only time that CWO2 Barnes put on her “Dr. Barnes” hat. On 17 March 2012, CWO2 Barnes wrote to Col. Oltman (and others):

Sir/Ma’am, I have been speaking to MSgt Papakie and GySgt Blenis extensively this morning and we were discussing Manning’s suicide comments from his initial interview. See the attached. If we go by what he stated which is that he was not suicidal once he was put on meds, then we have to ask ourselves, how come he is not suicidal now that he is off meds? *See* Attachment A, Bates Number 00449855.

Seriously, Dr. Quinn?⁶ CWO2 Barnes elementary logic and continued second guessing of the doctors’ decisions with respect to PFC Manning is astounding. The implication of her “logic” is that anyone who is ever suicidal must remain on medication for the rest of their life.

63. CWO4 Barnes embarrassing lack of logic continues in the next sentence of her email, where she writes:

It goes back to what I have been saying; anyone who wants to kill themselves will not give signs or do a memo for everyone to see. *Id.*

Bingo! Consequently, when PFC Manning states – while smiling – that he could conceivably kill himself with the elastic band of his underwear, this does not telegraph that he is actually suicidal. That CWO2 Barnes recognizes that detainees do not “do a memo for everyone to see” but nonetheless doesn’t apply that knowledge to the situation at hand illustrates the absurdity of CWO2 Barnes’ classification determination, not to mention the general atmosphere of absurdity at the Brig.

64. CWO2 Barnes concludes her email by stating:

⁶ Dr. Quinn, Medicine Woman is an American post-Civil War western/drama series created by Beth Sullivan. Dr. Michaela “Mike” Quinn, played by Jane Seymour, left Boston in search of adventure. She went to Colorado Springs, Colorado where she establishes herself as physician/adviser. *See* Wikipedia available at http://en.wikipedia.org/wiki/Dr._Quinn,_Medicine_Woman, last visited on 23 August 2012.

This is why I told Col. Malone that I wanted him to see everything we have in his record book when he and I first sat down. He quickly told me that he was aware of everything regarding the suicide and what took place in Kuwait etc. *Id.*

Apparently, CWO2 Barnes felt the need to remind COL Malone how to be a doctor and was not impressed when he “quickly” told her that he was already “aware of everything regarding the suicide and what took place in Kuwait.” *Id.* Rather than accept that the doctor had actually already considered events that happened almost 10 months prior, CWO2 Barnes felt the need to re-hash this issue with COL Malone.

65. Not only were CWO4 Averhart and CWO2 Barnes playing doctor, so too was Col. Mark Kauzlarich, the Chief of Staff for the Marine Corps Base Quantico. After PFC Manning’s joking comment about the elastic band of his underwear on 2 March 2011, Brig officials thought it necessary to get medical personnel involved. On 3 March 2011, Col. Choike wrote to Col. Oltman and asked, “How is he doing? When will the Dr arrive, or has he arrived?” *See* Attachment A, Bates Number 0049922-5. Col. Oltman responded:

He is doing better. A little surly this morning but seem to have gotten back in his box. No joy with Col Malone. He is scheduled for his normal visit tomorrow and but we want it today. We are talking with Capt Raimondo to get this resolved. Also have a SR detainee and another POI that we want evaluated. Capt Moore will deal with those two but my issue is the lack of responsiveness ... actually just gaining contact with Malone and his team. Barnes tells me she tries to contact and just gets answering machines. Clinic XO has all this information. I am sure she will get us what we need. *Id.*

66. Col. Choike then decided to get Col. Kauzlarich, involved. He wrote:

Chief, FYI.

Need to get a full-court press from our medical professionals to assist us in getting Col Malone down here ASAP!. *Id.*

67. Col. Kauzlarich then sounded the alarm. He indicated that he “ha[s] deemed this urgent and require[s] immediate plan of action for coverage.” *Id.* Capt. Lisa Raimondo informed Col. Kauzlarich that:

CAPT Neill just spoke to COL Malone. COL Malone indicated that he spoke with WO Barnes at the Brig and all is good to go with his planned visit for tomorrow. Brig officer is comfortable with the plan. *Id.*

68. Col. Kauzlarich did not concur with the plan. He wrote to Capt. Neill, Maj. Ebitz, Col. Oltman and Col. Miner:

Unfortunately, CO and I are not comfortable with the plan. I’m not a psychiatrist; however, if one of my very vulnerable patients, who has been on suicide watch before, was going to be informed of 22 new charges and one of them holds the

death penalty, maybe-just-maybe I'd be standing by to assist that patient. Sorry for venting my frustration with sarcasm. *Id.*

69. Like so many others at Quantico, Col. Kauzlarich considered himself better positioned to determine whether PFC Manning needed medical assistance than an actual medical doctor. As a result, he went over CWO2 Barnes' head and contacted the Special Court-Martial Convening Authority, COL Carl Coffman, stating:

Carl,

Need your assistance.

Yesterday PFC Manning was notified of new charges. He demonstrated disturbing behavior. We have attempted to reach Col Malone but are not having any luck.

Bottom line ... we need Col Malone or his backup behavioral health provider to the Quantico Brig today to evaluate PFC Manning.

Your support is greatly appreciated.

Mark

See Attachment A, Bates Number 00449877. The "disturbing behavior" that Col. Kauzlarich apparently is referring to is PFC Manning mumbling in his cell.

70. Despite all the hoop-la and the necessity for a "full court press," the medical evaluation on 4 March 2011 revealed that there was no problem. In an email to LtGen. Flynn, among others, Col. Choike writes:

Mental Health visit by Col Malone is complete. This initial report came from Capt Neill, CO Naval Health Clinic and the Brig Medical Officer, who was just debriefed by Col Malone this afternoon after his visit with Manning. PFC Manning is doing well, appeared in good spirits and has been taken off a medication for an anxiety disorder, the removal is in response to his improved status. His recent actions and statements are not related any mental disorder.

Initial report from Col Oltman - the Brig OIC is going to leave Manning in the same status (POI) and his handling instructions will remain the same for the immediate future; meaning he will only have his blankets from Taps to Reveille. CW02 Barnes and Col Oltman discussed at length the situation and CWO Barnes will continue to review his behavior/actions and review the recommendations of the C&A Board. The C&A Board goes every Friday ... so he will remain "as is" for now ... but, handling instructions can be changed at any time, based upon his observed ongoing behavior.

Manning's recent comments and behavior have the entire Brig Staff concerned, and they are trying to only add minimal precautionary measures necessary, that will allow him to have some space and reduce the stress, while protecting him/keeping him safe.

See Attachment A, Bates Number 00449860.

71. It is important to note that it was not just COL Malone (PFC Manning's treating psychiatrist at the time) who determined that it was not necessary for a medical professional to be present on 2 March 2011, when PFC Manning was read his new charges. CDR Han Bui, wrote an email to various medical personnel – including Capt. Neill – on 4 March 2011, stating as follows:

I went to the brig and had a discussion with CAPT Moore about the prisoners. The prisoners are doing fine. PFC M was on the phone with his lawyer. He is doing fine.

CAPT Moore and I will get together next week to discuss brig medical procedures. Would like to foster better communication between psych and SMO.

We would like to meet with DBC,XO,CO after we have a plan.

Also, both he and I agree that it is not necessary or indicated for COL Malone to be around/present when M was read his charges. He is a safe environment. If he acts up, he will be transported to WRAMC for evaluation and inpatient admission.

I believe there is a big difference between "want" and "need". We should inform/educate our Marine counterparts what is medically/psychologically appropriate, what we can provide and the best way to provide care for the prisoners. This may require a round-table meeting with the Marines.

The base is hypersensitive after the incident last year at the brig. However, it bothers me a little that the brig will place prisoners on "suicide watch" without consulting me. Then they wait for the psychiatrist a few days later to recommend taking them off suicide-watch. It is almost like playing half-doctor.

This is how the brig has been functioning prior to my arrival. Not sure that my role is truly that of the brig medical officer.

I can assure our COC that I am here to do my job and support our COC. I have no agenda.

See Attachment A, Bates Number 00449838.

72. As is readily apparent from CDR Bui's email, even he believes that Quantico Brig officials were "playing half-doctor" when it came to PFC Manning. This "playing half-doctor" resulted

in PFC Manning being subjected to conditions far more onerous than necessary to ensure his presence at trial, to protect himself, or to protect others.⁷

73. The repeated questioning of medical decisions on the part of *every* decision-making authority at the Brig – CWO4 Averhart, CWO2 Barnes, Col. Oltman, Col. Kauzlarich, Col. Choike – shows that classification determinations were made on an improper basis. That is, classification determinations were based upon these individuals’ armchair psychiatry, steering the process in the direction that LtGen. Flynn wanted, and not upon any legitimate medical input by those who are qualified to make such determinations.

74. Various Quantico decision makers have repeatedly stated that they considered all relevant factors. This is not true. Since none of the decision makers had confidence in the Brig doctors (either Capt. Hocter or COL Malone), the medical evidence was never a factor that was given any weight. The decisions to constantly override the medical providers’ opinions on the POI designation was based on Quantico officials’ view that the doctors did not know what they were doing and that they (as confinement officials) were qualified to make and/or question medical determinations. As argued above, by allowing doctors in whom Brig officials had no trust or confidence to be PFC Manning’s medical health providers, PFC Manning was denied any opportunity to be removed from the extremely rigorous conditions of his confinement.

⁷ There are numerous other examples of Brig officials weighing in on medical issues. It seems that everyone at Quantico believed they had a medical degree. For instance:

- On 17 November 2010, Col. Oltman wrote to Col. Choike (copying Col. Kauzlarich and Capt Neill):

Only note of interest is Manning allegation that he thinks the defense counsil [sic. – the Quantico Brig] is monitoring his privileged visits. We will watch this closely as this could be a stressor and a change to his normal or what has been normal for him, mind set. May be something that Doc Hocter wants to explore. See Attachment A, Bates Number 00449906.
- On 18 January 2011, Col. Oltman indicated to Col. Kauzlarich that in response to the incident in the recreation hall, “I expect Dr. Hocter to increase his medication.” See Attachment A, Bates Number 00449882. PFC Manning’s medication was not increased. *Id.*
- On 8 April 2011, CWO2 Barnes talked about the incoming psychiatrist: “Since she will be working with him on the personality issues, it will be a while before we see change so we should not expect results right away. How fast he builds a relationship with her is key since he took a long time to develop a good rapport with Col Malone. On the flip side of that, he established rapport with Lt. Col Russell immediately so there is no telling how things will go with Dr. Yeaw.” See Attachment A, Bates Number 00449854.
- On 2 February 2011, after receiving the weekly medical report, Col. Oltman writes, “The Dr. Recommends removal from POI but stats [sic] that the risks and benefits of continued POI are not detrimental ... or at least that’s how I read what he wrote.” See Attachment A, Bates Number 00449840. It appears that nobody actually asked COL Malone what he meant by a statement that is not even grammatically correct. Rather, Col. Oltman latched onto the statement (even copying Col. Choike, Col. Kauzlarich and Lt.Col. Greer), as if to suggest that Quantico’s actions in keeping PFC Manning in POI was justified. Col. Oltman, however, outright ignored the clear part of COL Malone’s recommendation – “recommends removal from POI.” This is a clear example of Brig officials hearing what they want to hear.

D. Judge Advocate Officers Were Complicit in the Unlawful Pretrial Punishment at Quantico

75. In the Defense's Article 13 motion, the Defense described a meeting where Col. Oltman ordered that PFC Manning would be held in POI and on MAX indefinitely because "nothing was going to happen on [his] watch." See Defense Motion to Dismiss for Unlawful Pretrial Punishment, dated 27 July 2012, p. 37. The Defense has since learned that LtCol. Greer was the Judge Advocate who was present at that meeting and said nothing in response to Col. Oltman's order.

76. In fact, right after the meeting, LtCol. Greer wrote an email to the Staff Judge Advocate for the Military District of Washington, COL Corey L. Bradley, and to the trial counsel (presumably, MAJ Ashden Fein) stating, *inter alia*, the following:

Issue 3: Dr Hctor [sic] expressed his concern about the POI status. He felt that POI was not justified from a medical viewpoint. The Brig OIC explained that the medical component was part of the overall classification assessment and that the process was continuously evaluated. Hctor [sic] stated clearly that he did not support the POI status.

See Attachment A, Bates Number 00449938-9.

77. Apparently the fact that the psychiatrist who had been treating PFC Manning for approximately six months had "stated clearly that he did not support the POI status" did not raise any concern in the mind of LtCol. Greer about the propriety of the classification decisions being made in PFC Manning's case. This, of course, all makes sense when one recalls that LtCol. Greer knew that Col. Oltman was simply effectuating a directive from LtGen. Flynn.⁸ Otherwise, a reasonable attorney would have inquired further into specifically why Col. Oltman was discounting the medical opinions in his classification determinations. LtCol. Greer should have also clarified what Col. Oltman meant when he said PFC Manning would remain in MAX and POI indefinitely. Anyone familiar with the procedural due process protections afforded under the Brig's rules would realize that Col. Oltman's statement was improper.

78. Not only did LtCol. Greer not say anything to Col. Oltman at the meeting, he recommended that the trial counsel obtain the relevant paperwork (presumably to "combat" the Article 13 issues) and warned trial counsel not to make a fuss about POI. In LtCol. Greer's words:

Issue 4: Suggest that you request from CA [COL Coffman] to MCB Cdr [Col. Choike] that he provide you with all classification and assignment documentation regarding Manning. You could simply state to build SA [situational awareness] for the CA and to prepare for possible litigation, you request the classification

⁸ Even though the Defense has only a small fraction of the emails in this case, it's clear that LtCol. Greer is "in the know" about LtGen. Flynn's involvement in PFC Manning's custody determination. For instance, LtCol. Greer is copied on a 10 August 2010 email to LtGen. Flynn where Col. Choike is describing the "cautious approach" that CWO4 Averhart had elected to adopt. See Attachment A, Bates Number 0049918.

documentation and that this request is ongoing. That way we have an official request we can respond to.

Issue 5: This is related to 3 and 4. Stand by for heavy rolls if the CA [COL Coffman] decides to request the Base commander [Col. Choike] to review and consider removing Manning's POI status. We are continuously reviewing that status. Unless you want to run our Brig, I think you undercut your own legal position if you actually recommend that the POI status be removed. We are the jailors, either you trust us or you don't. if you don't, then move him. The best thing would be to get this through the 706 process so we can have that additional info to consider in the status review. Again, the Brig makes a team decision on his status, it is based on experience, training, input from the personnel who interact with Manning, and the medical input. You all know that he is not solitary, that all the detainees have their own cell, that no detainees may PT in their cells, etc. As I told John [CPT John Haberland] last night, unless someone wants to come down and accept responsibility for the daily safety and welfare of Manning, it is our job.

Id. The message here is clear – if you want our help, you better shut up and deal with how we do things.

79. A few days after MAJ Fein received this email, he indicated to Mr. Coombs that “In addition to the RCM 305(g) request, we will formally readdress the POI status with [the Convening Authority, COL Coffman] as well.” See Attachment B. It is doubtful that trial counsel actually addressed the issue with the Convening Authority. After all, Lt.Col. Greer had advised the trial counsel that if COL Coffman gets involved, everyone should be “prepared for heavy rolls.” See Attachment A, Bates Number 00449938-9. He also advised that “you undercut your own legal position if you actually recommend that the POI status be removed.” *Id.* Given this warning, it is not surprising that COL Coffman did not request Quantico to review PFC Manning's POI status.

80. What Lt.Col. Greer's email reveals is not a lawyer who is looking to ensure that the Brig is on the “up and up” on what it is doing. Rather, it reveals a lawyer who is part of a much larger picture – a picture involving a three-star general who is concerned about political and media fallout. In order to “encourage” trial counsel not to pursue this issue, Lt.Col. Greer resorted to a not-so-veiled threat: if you don't like how we're doing things, we will gladly give him back to you.

81. Lt.Col. Greer's lack of concern with Quantico's custody decisions is also reflected in an email where he addresses the inquiry received from the United Nations. He indicates that he has been working with MGen. Ary prior in order to formulate a “somewhat ‘stock’ response” to the inquiry, such as has been used with similar inquiries into GITMO. See Attachment A, Bates Number 00449940.

82. Even LtGen. Flynn's own SJA, Col. Christopher Miner, demonstrated a lack of concern over Quantico's custody decisions. Col. Miner sent an email to LtCol. Greer, Col. Oltman, Col.

Kauzlarich, and Col. Choike after hearing that PFC Manning was about to receive the new charge sheet, which included Article 104 offense, and had just received the initial denial of his Article 138 complaint. In his email, Col. Miner joked “So I guess the C&A Board won’t be recommending MED-In anytime soon.” *See* Attachment A, Bates Number 00449891.

83. The failure of the judge advocates involved in this case to ask the difficult questions and to voice the difficult opinions placed a cloud over this case. The Corps depends upon its judge advocates to be the moral compass for the command. The failure to do so in this case resulted in the unlawful pretrial punishment of PFC Manning by those that were charged with his care. This failure reflects poorly upon the Corps and the military institution as a whole.

E. CWO2 Barnes’ Feeble Justification for Her Decision to Strip PFC Manning at Night

84. After CWO2 Barnes ordered that PFC Manning be stripped at night after 2 March 2011, Quantico came under even more scrutiny for its mistreatment of PFC Manning. Col. Oltman asked CWO2 Barnes to “synthesize ... the rationale [sic] for [her] action and the authority vested and cited by you in the SECNAV.” *See* Attachment A, Bates Number 00449862. CWO2 Barnes responded:

Sir, when I made the decision to have detainee Manning’s underwear removed after taps with his other gear and still keep him POI, my thought process was that he did not threaten suicide nor did he make a suicidal gesture as per the SECNAV. In addition, we did not feel that the extra measures were necessary during regular day time hours. He never said he would commit suicide nor did he act in a manner that was similar to the incident in January with CWO Averhart where he was placed in SR status. His behavior was not erratic in any way, as matter of fact, he was smiling when he was talking to MSgt Papakie. The SECNAV states that I can remove clothing when deemed necessary. I found it hard to justify assigning him the SR status, it is easier to explain why we left him in POI status than why we placed him in SR status without adhering to the guidance in the SECNAV. I also could not justify not taking action in the event of a possible suicide or an attempt at it after he made that comment to MSgt Papakie. MSgt Papakie, GySgt Blenis and I all felt uncomfortable and almost at the same time said we need to make adjustments. ...

“ b. Prisoners who have threatened suicide or have made a suicidal gesture, but are found fit for confinement, may be placed in the category of “suicide risk” for observation. They shall be placed in special quarters under continuous observation. CO/OIC/CPOIC may direct removal of the prisoner's clothing when deemed necessary. Prisoner must be under observation of a supervisor of the same sex.”

85. Although this “explanation” apparently sufficed for Col. Oltman, it actually provides a more compelling justification for why CWO2 Barnes did not have authority to order PFC Manning’s clothes to be removed from him. What we know from CWO2 Barnes’ statement is the following:

- i. PFC Manning did not threaten suicide nor did he make a suicidal gesture as per the SECNAV. *Id.*
- ii. CWO2 Barnes did not feel that the extra measures were necessary during regular day time hours. *Id.* She does not explain why the extra measures were not necessary during the day.
- iii. PFC Manning never said he would commit suicide nor did he act in a manner that was similar to the incident in January with CWO4 Averhart. *Id.*
- iv. PFC Manning's behavior was not erratic in any way. As matter of fact, PFC Manning was smiling when he was talking to MSgt Papakie. *Id.*
- v. In light of all this, CWO2 Barnes found it hard to justify assigning PFC Manning to SR status. *Id.*
- vi. CWO2 Barnes found it "easier to explain why we left him in POI status than why we placed him in SR status without adhering to the guidance in the SECNAV." *Id.*

86. So far, CWO2 Barnes has not provided *any* explanation – much less any compelling explanation – of why it was appropriate for her to order PFC Manning's clothing to be removed. CWO2 Barnes' only explanation for her decision was that she "could not justify not taking action in the event of a possible suicide or an attempt at it after he made that comment to MSgt Papakie." *Id.* One would think that a Brig commander would have more of an explanation than simply, "I could not justify not taking action" in case something happened. CWO2 Barnes apparently believed that her authority to remove PFC Manning's clothing derived from the cited SECNAVINST provision. However, while the provision states that "CO/OIC/CPOIC may direct removal of the prisoner's clothing when deemed necessary," this is in the context of placing a detainee on suicide risk – not in the context of increasing special handling instructions. Thus, both CWO2 Barnes' cited rationale and authority are dubious at best.

87. CWO2 Barnes' rationale for removing PFC Manning's clothing at night is particularly questionable when one considers her email to Col. Oltman just a couple of weeks later where she states, "It goes back to what I have been saying; anyone who wants to kill themselves will not give signs or do a memo for everyone to see." *See* Attachment A, Bates Number 00449855. CWO2 Barnes' justification for removing PFC Manning's clothing at night cannot be squared with her statement that a prisoner who wants to kill themselves is not going to tell you about it. That CWO2 Barnes could not appreciate the obvious flaws in her own logic simply speaks to the fact that as long as she continued to make the most restrictive decisions possible, no one would ever question her because she knew she had top cover from LtGen. Flynn.

E. The Quantico Brig's Mentality of "Anything Goes"

88. The paperwork that the Defense has received from the Brig gives the outward appearance of propriety – that the Brig is a professional and well-managed environment. It was anything but.

89. As described in its Article 13 motion, Brig guards harassed PFC Manning the morning of January 18 on his way to recreation call. This harassment, in turn, spawned PFC Manning's anxiety attack and ultimately his being placed in Suicide Risk status. The Brig guards will undoubtedly attempt to justify their behavior and place the blame on PFC Manning. The guards

obviously have a vested interest in painting themselves to be saints in respect to this incident. However, a note from Capt. Raimondo to Capt. Neill on that day is telling:

CAPT Hocter stopped by to inform you that he was called to the brig urgently this afternoon to evaluate mbr for an anxiety attack. He indicated that two of the guards were gruff in their demeanor today and this “sent mbr into heightened state of anxiety.” (Likely reactive in nature due to guard's demeanor).

Mbr was able to be calmed via dialogue and presence of CAPT Hocter, no new or additional meds were required. CAPT Hocter's recommendation to brig was to continue POI, however, he recognizes that the brig guards are now anxious and they may impart suicide precautions for mbr. CAPT Hocter will relay all of this to COL Malone.

See Attachment A, Bates Number 00449842. This email shows that it was the guards’ “gruff” demeanor that precipitated the events of 18 January 2011.

90. Other emails that the Defense has received from the Government reveal that the Brig operated like an “old boys club” -- one where bad behavior was perfectly acceptable. For example, on 15 December 2010, GySgt Blenis wrote to Msgt Papapkie and CWO4 Averhart:

Good morning gentlemen,

How is this verbage [sic]?

(2) On 13 December 2010, a package from Amazon.com was delivered to the Brig by a construction worker who works at a nearby site. There was no previous request for a package submitted by Det Manning and there was no previous approval for a package given by the Brig OIC. When asked about any potential packages that may be coming, Det Manning stated that he was not aware of any but thought that family members may be sending something due to his upcoming birthday. The package is being rejected and returned to sender due to the manner in which it was received and also because there was no prior request or knowledge of the package by SND, and there was no pre-approval given by the Brig OIC, and *we felt like being dicks*.

R/
GySgt Blenis

See Attachment A, Bates Number 00449800 (emphasis added).

91. That GySgt Blenis thought it appropriate to write what he did is unbelievable. What is even more unbelievable is CWO4 Averhart’s reaction. Rather than indicating that these sorts of “jokes” are not acceptable, CWO4 Averhart writes, “You crazy Gunns!” This sort of communication is clearly not appropriate in a professional setting. However, it reflects the culture at Quantico – a culture where “boys will be boys” and nobody is held to account for their conduct.

92. An even more troubling email is sent by MSgt Papakie on 4 March 2011, a couple of days after PFC Manning had been placed on Suicide Risk after the comments about his underwear. MSgt Papakie wrote the following email to GySgt Blenis, SSgt Boafu, SSgt Buck and Sgt Fuller:

Make sure he is not standing at attention naked for evening count right before taps. You should be taking his panties right before he lays down.

See Attachment A, Bates Number 00449794. The fact that a senior enlisted would refer to a detainee's undergarments as "panties" in correspondence with four subordinates demonstrates not only incredibly poor judgment, but also a culture where anything goes. The Defense also believes that the "panties" comment reflects intolerance and homophobia on the part of MSgt Papakie (and likely the other enlisted at the Brig).

93. Given the above, this Court should look beyond the outward appearance of propriety and see the Quantico Brig for what it really was – an institution that rewarded bad behavior and that was simply looking to "cover its six" by following the direction of LtGen. Flynn.

CONCLUSION

94. In light of the foregoing, the Defense requests this Court dismiss all charges with prejudice owing to the flagrant violation of PFC Manning's constitutional right to not be punished prior to trial. Should this Court determine that dismissal is not an appropriate remedy, the Defense requests meaningful relief in the form of at least 10-for-1 sentencing credit for the 265 days PFC Manning inappropriately spent in the equivalent of solitary confinement and, if PFC Manning elects to proceed judge-alone, consideration of the unlawful pretrial punishment issue in sentencing.

Respectfully submitted,

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